

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B085C

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SUZANNA SOSA,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
COLORADO STATE PENITENTIARY,

Respondent.

The hearing in this matter was held on June 12 and 20, 1997, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Ceri Williams, Assistant Attorney General. Complainant, Suzanna Soza, was present at the hearing and represented by Carol Iten, Attorney at Law.

Respondent called the following employees of the Department of Corrections (Department) to testify at hearing: Linda McCall; Richard Wright; Dan Blackwell; Dennis Houghnon; Dodie Schulze; Brian McFee; and Donice Neal. Complainant testified in her own behalf and called no other witnesses to testify at hearing.

The parties stipulated to the admission into evidence of Respondent's exhibits 1 through 3, 5, 6, 12, 14, and 15. Respondent's exhibits 4, 7 through 11, 13, 17 through 19, 23, and 31 were admitted into evidence without objection. Respondent's exhibits 16, 24, 29, 30 through 37, and 39 were admitted into evidence over objection.

Complainant's exhibits A through D were admitted into evidence without objection.

MATTER APPEALED

These consolidated appeals pertain to a fifteen day disciplinary suspension and a disciplinary reduction in pay.

ISSUES

The parties raise the following issues:

1. whether Complainant engaged in the conduct for which discipline was imposed;
2. whether the conduct proven to have occurred constitutes violation of State Personnel Board rules or Department Administrative Regulations.
3. whether the decisions to imposed a disciplinary suspension and three month step reduction in pay was arbitrary, capricious, or contrary to rule or law.
4. whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Suzanna Sosa (Sosa or Complainant) was employed by the Department of Corrections (DOC or Respondent) as a Correctional Officer. She has been so employed for 10 years. In the latter part of 1996 and the beginning of 1997, Sosa worked at the Colorado State Penitentiary (CSP). She had done so for four years.
2. At CSP, Sosa was assigned to work in the program control center under the supervision of Lieutenant Brian McFee (McFee). McFee supervised Sosa for for two years. The delegated appointing authority for Sosa's position was Donice Neal, Superintendent of CSP.
3. CSP is a maximum security facility, housing death row inmates. CSP inmates are locked in their cells 23 hours per day, they receive their meals in their cells, and they are escorted in restraints by two staff members whenever they go outside their cells. Safety and security of inmates and staff is of primary concern at CSP.
4. In the program control center, Sosa was responsible for opening doors through out the facility. Sosa's post in the program control center was essential to security. Sosa was not permitted to admit anyone to the program control center without the permission of the shift commander on duty. Post orders containing this direction were maintained in the program control center. Sosa was aware of the duties of this post.

5. Sosa and McFee had a poor working relationship. They argued and frequently exchanged angry words. Sosa felt intimidated and harassed by McFee. She felt that he had no respect for her. Sosa suspected that McFee was supported in his actions toward her by his supervisor, Captain Richard Wright. Sosa participated as a witness in a controversial case involving a superintendent at the Denver Reception and Diagnostic Center, Dr. Frank Rice. Sosa testified in that case that she was sexually harassed by Frank Rice. Since her testimony, she felt harassed by some of her supervisors.

6. On November 6, 1996, McFee came to the program control center door seeking admission for the purpose of performing official business. Sosa feared that McFee was seeking admission to the program control center in order to harass her. She refused him admission.

7. McFee advised his supervisor Richard Wright that Sosa refused him admission to the program control center. Sosa was relieved of her command of the program control center and directed to meet with Richard Wright and McFee.

8. Sosa reported to Richard Wright that McFee was harassing her. Wright explained to Sosa that McFee was on DOC business and he should not be prevented from entering the program control center. Wright advised Sosa that to admit correctional officers to the program control center, the post orders required, that she should seek the approval of the shift commander and not make that judgment for herself.

9. Sosa returned to her post at the program control center. McFee again sought entry to the program control center. Sosa again refused McFee entry. She did not contact the shift commander to obtain permission to admit McFee.

10. McFee reported Sosa's action denying him access to the program control center to Richard Wright and Major Beth McCall. At the direction of the superintendent, Donice Neal, Major McCall relieved Sosa of duty and placed her on administrative suspension with pay.

11. Neal believed that Sosa's conduct might warrant disciplinary action. Neal sought and was granted appointing authority to conduct a R8-3-3 meeting with Sosa and to impose disciplinary action. Following notice to Sosa, the R8-3-3 meeting was held with her on November 19, 1996. Sosa attended the meeting with her representative.

12. At the meeting, Sosa complained to Donice Neal that she was suffering from on going stress and harassment as a result of her participation in the Frank Rice matter. Sosa explained the McFee was harassing and intimidating her. Donice Neal assured Sosa that she would investigate her allegations of harassment and intimidation. Neal felt strongly that no correctional officer should suffer as a result of their participation in the Frank Rice case.

13. Sosa explained that her behavior toward McFee on November 6, 1996, was required because she could no longer tolerate McFee's treatment of her.

14. Neal considered Sosa's explanation for her actions. She also considered Sosa's employment record with DOC. Neal was impress with Sosa's long years of service and the fact that she performed her job competently in the past. However, she concluded that Sosa's conduct on November 6, 1996, should be addressed through a disciplinary action.

15. Neal concluded that Sosa's actions toward McFee were insubordinate and constituted a wilful refusal to follow facility procedures. Neal concluded that, while she intended to investigate Sosa's allegations of harassment and intimidation, there was no excuse for Sosa's refusal to comply with orders after having received instructions from Richard Wright that she must carry out her duties in accordance with the post orders.

16. Neal considered the fact that insubordinate behavior among correctional officers presents a security problem and undermines morale. Neal concluded that Sosa's conduct violated Administrative Regulation, Staff Code of Conduct, Section IV. AA. It states, "Staff shall comply and obey all DOC Administrative Regulations, rules, duties, orders, procedures and Administrative Instructions".

17. Neal found that Sosa had other recourse if she believed that McFee was harassing and intimidating her. Neal believed that Sosa should have contacted the shift commander before allowing McFee to gain entry to the program control center. If McFee was creating problems for her, the shift commander's assistance could have been enlisted to assist Sosa in dealing with the problem.

18. Neal viewed Sosa's behavior as a serious infraction of DOC Administrative Regulation 1450-1. Thus, she decided to impose a fifteen day disciplinary suspension.

19. In November, 1996, Sosa began her shift at 5:45 a.m. She was expected to report to roll call at this time and her post at 6:00

a.m. CSP is operated 24 hours per day 7 days per week. It is important to the security of the facility and to employee morale that officers report for their assigned shifts on time. If officers are not present at the beginning of their shift, they fail to receive critical information during roll call. This can cause security problems. Correctional Officers are expected to contact the shift commander two hours before the start of their shift if they are going to be absent from work or late arriving at work. Failure to comply with this procedure results in another correctional officer being required to work a double shift. Officers who work a double shift may be less alert to security issues and their morale may be affected. Paying officers overtime to cover the shift of a correctional officer who fails to comply with the established procedures has a negative fiscal impact on the facility.

20. On November 30, 1996, Sosa did not report for work. She failed to advise the shift commander that she would be late to work. After repeated attempts were made to contact Sosa at her home, Sosa contacted her supervisor at 11:25 a.m. Since it was close to the end of her shift, she was directed not to come into work and that she would be assessed annual leave for her absence. On December 7, 1996, Sosa did not report for roll call and signed into work at 6:00 a.m., fifteen minutes late.

21. Donice Neal was advised of Sosa's actions on November 30, 1996, and December 7, 1996. Neal decided that she would hold another R8-3-3 meeting with Sosa to determine whether disciplinary action was warranted. Neal received a delegation of appointing authority to conduct an R8-3-3 meeting and to impose discipline. The R8-3-3 meeting was held with Sosa and her representative on December 31, 1996.

22. Neal prepared for the R8-3-3 meeting by reviewing Sosa's personnel file. Sosa's personnel file reflected that during the preceding job performance rating period, she received an overall rating of "good". Further, her file contained numerous instances where she was warned that her attendance, punctuality, and failure to follow reporting procedures was causing a problem for CSP and she was directed to improve her job performance.

23. At the December 31, 1996, R8-3-3 meeting, Sosa explained to Neal that she was under stress and that she experiences difficulty sleeping. Sosa explained that she frequently cannot sleep during the night and that she takes prescribed medications for her condition that cause her to oversleep. Sosa asked Neal to put her on the graveyard shift because this shift would allow her to arrive at work on time and get her rest also.

24. At CSP, the graveyard shift is designated as the training shift. Experienced correctional officers on this shift must have exemplary employment records to be permitted to work. Since Sosa had been having difficulty in her employment since at least 1994, Neal took her request under advisement.

25. On January 2, 1997, Neal imposed a corrective action and disciplinary action. The corrective action directed Sosa to arrive at work on time. The disciplinary action resulted in a two step reduction in pay for a three month period. Neal warned Sosa that her job performance would be reviewed in 30 days to determine whether she improved her punctuality. Sosa was further warned that if improvement was not shown she might be subjected to further disciplinary or corrective action.

26. Following the first R8-3-3 meeting held on November 19, 1996, during which Sosa alleged that she was harassed and intimidated by McFee, Neal contacted the Inspector General's office and requested that an investigation be conducted into Sosa's allegation. Sosa was not cooperative in the investigation. She did not return the investigator's telephone call to request an interview with her. On January 7, 1997, she agreed to a personal interview.

27. On January 30, 1997, after learning of Sosa's lack of cooperation in the investigation, Neal wrote to Sosa. Neal noted Sosa's lack of cooperation and advised Sosa that Neal would only consider her request for transfer to the graveyard shift after the investigation was completed.

28. Neal considered Sosa's allegation of harassment and intimidation to be separate from her misconduct resulting in the imposition of discipline. For that reason, Neal did not delay the disciplinary process to await the outcome of the investigation.

29. On March 10, 1997, the investigator completed his investigation and submitted a report. In the course of the investigation, he interviewed 27 correctional officers. The report was provided to Neal and concluded that there was no evidence that Sosa was harassed or intimidated in her employment.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on Respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S.

(1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. *Van de Vegt v. Board of Commissioners*, 55 P.2d 703, 705 (Colo. 1936).

Complainant contends that Donice Neal acted arbitrarily and capriciously when she imposed the fifteen day disciplinary suspension and the disciplinary reduction in pay. Complainant argues that Neal should have delayed the imposition of the discipline until the investigation was completed. Complainant asserts that the failure to take the investigation into consideration makes the discipline imposed unsustainable.

Respondent contends that it sustain its burden of proof with regard to the disciplinary actions imposed. Respondent established that Complainant engaged in the conduct for which discipline was imposed, that the conduct constituted violation of State Personnel Board rules, and that the choices of sanctions were neither arbitrary or capricious.

Respondent's argument is accurate. A preponderance of the credible evidence presented at hearing established that Complainant was insubordinate, failed to arrive at work punctually, and failed to comply with DOC reporting procedures in violation of DOC Administrative Regulation 1450-1, Staff Code of Conduct, Section IV. AA. Complainant was previously warned about this conduct and thus imposition of the disciplinary actions imposed here was neither arbitrary, capricious, nor contrary to rule or law.

Complainant's contention that Neal's disciplinary actions were not reasonable because she failed to take into consideration the investigation of Complainant's allegation that she was harassed and intimidated was considered and determined to be without merit.

The evidence established that Complainant's misconduct was not related to her allegations of harassment and intimidation. Complainant continued to have an obligation to perform her job satisfactorily. And, when she failed to do so she was properly disciplined.

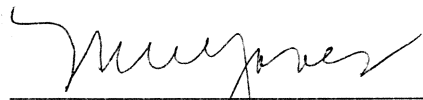
CONCLUSIONS OF LAW

1. The evidence established that Complainant engaged in the conduct for which discipline was imposed.
2. The evidence established that the conduct proven to have occurred constituted violation of State Personnel Board rules.
3. The decisions to impose a fifteen day disciplinary suspension and a disciplinary three month step reduction in pay was neither arbitrary, capricious, or contrary to rule or law.
4. Neither party is entitled to an award of attorney fees and costs.

ORDER

The action of Respondent is affirmed. The appeal is dismissed with prejudice.

Dated this 9 day of
July, 1997, at
Denver, Colorado.



Margot W. Jones
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the

parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the 9 day of July, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Carol M. Iten
AFSCME
789 Sherman St., Suite 640
Denver, CO 80203

and to the respondent's representative in the interagency mail, addressed as follows:

Toni Jo Gray
Office of the Attorney General
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203

